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No. 00-

IN THE

Supreme Court of the United States

TAYLOR FORGE STAINLESS, INC.
and MICHAEL W. KEARNEY,

Petitioners,

v.

VIACOM INTERNATIONAL INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress intend that the Supplemental Jurisdiction Statute, 28 U.S.C. 1367, eviscerate the complete diversity requirements of 28 U.S.C. 1332 and the body of precedent interpreting and applying those complete diversity requirements including indispensable party joinder requirements and realignment of parties according to their actual interests in the case?

2. May a court of appeals interpret the Supplemental Jurisdiction Statute, 28 U.S.C. 1367 to force a non-diverse indispensable party to present its substantial claims against the plaintiff in federal litigation merely because the non-diverse party was joined on a fourth-party defendant contribution claim?

3. Does the presence of a non-diverse party who is forced to present its substantial germaine claims against the plaintiff in a diversity suit destroy diversity, notwithstanding the provisions of the Supplemental Jurisdiction Statute, 28 U.S.C. 1367?

4. Does 28 U.S.C. 1367(c) permit courts of appeals to usurp the authority supplied by Congress to district courts to make the discretionary decision whether to assert supplemental jurisdiction pursuant to this statute?

PARTIES TO THE PROCEEDING

Petitioners

Taylor Forge Stainless, Inc. and Michael Kearney. Taylor Forge Stainless, Inc. has no parent companies and no publicly held company owns any of its stock.

Respondents

Viacom International Inc.

Camp, Dresser & McKee, and Conolog Corporation are parties below and are being served as Respondents as well.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 212 F. 3d 721 (2d Cir. 2000). A copy of the Opinion is included as Appendix A at 1a. The opinion of the District Court for the Southern District of New York is published at 190 F.R.D. 97 (S.D.N.Y. 1999) and is included as Appendix B at 18a.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Second Circuit issued its opinion on May 19, 2000. On June 1, 2000 Petitioners timely filed a Petition for Rehearing and Rehearing En Banc which the United States Court of Appeals denied on July 12, 2000 (App. C at 33).[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1367(a), (b) and (c); and
28 U.S.C. 1332. See App. D at 35a.

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i). Citations to "L.App." are to the Lodging Appendix filed with this Petition for Writ of Certiorari.

STATEMENT OF THE CASE

For purposes of this Petition, the facts of the case are uncomplicated and undisputed. Petitioner, Michael Kearney ("Kearney"), is a Florida resident. Petitioner, Taylor Forge Stainless, Inc. ("Taylor Forge") is a Delaware corporation with its principal place of business in New Jersey. Respondent, Viacom International Inc. ("Viacom") is a Delaware corporation with its principal place of business in New York. On October 26, 1984, Respondent's, Viacom's, predecessor, Gulf & Western Manufacturing Company ("Gulf & Western"), entered into a contract to sell all of the shares of its wholly owned subsidiary, Taylor Forge, to Petitioner, Kearney, (the "Contract").

Numerous disputes have arisen out of the terms of the Contract and otherwise. One of those disputes concerns an on-going environmental pollution problem at the Taylor Forge facility in Branchburg, New Jersey ("Taylor Forge Site"). That dispute ("the Environmental Issue") concerns the following: which of the parties to this litigation bears what responsibility for costs of this now 16 year old environmental case. The costs include sampling, delineation and remediation at the Taylor Forge Site, the end of which, and total costs associated with which are not yet known. Viacom asserts that the total costs already exceed four million dollars.

In 1993, Petitioners, Taylor Forge and Kearney, filed a lawsuit against Viacom's predecessor (Paramount Communications Inc.) in the Superior Court of New Jersey, Somerset County (the "NJ State Action") to resolve various disputes, including the Environmental Issue. All issues, save the Environmental Issue, were resolved and

the parties agreed to (a) attempt to settle that issue outside the litigation arena, and (b) to dismiss the NJ State Action, on consent and without prejudice, and with jurisdiction preserved so that the NJ State Action could be reinstated if settlement attempts were unfruitful.

In September, 1998, during protracted settlement discussions among these parties, Viacom filed suit in federal court in New York naming only Petitioner, Kearney, as a defendant (the "Federal Action"). Viacom cited complete diversity jurisdiction pursuant to 28 U.S.C. 1332 as the sole basis for subject matter jurisdiction (L.App. at L-137). Although Taylor Forge had been a party plaintiff to the 1993 NJ State Action and had numerous obligations to Viacom arising under the Contract, Viacom did not name Taylor Forge as a defendant, even though Viacom had asserted in its complaint that Taylor Forge had worsened the environmental condition of the property. (L.App. at L-140). Additionally, Taylor Forge had substantial related claims against Viacom.

In short, Viacom had taken a single claim from the several substantial issues in the NJ State Action and asserted this claim in the Federal Action against the only diverse party in the NJ State Action. Of course, had Viacom named Taylor Forge as a defendant, diversity jurisdiction would have been defeated since Viacom and Taylor Forge are both Delaware corporations.

Shortly after service of the federal complaint, Petitioners reinstated the 1993 NJ State Action under its original docket number. Kearney answered the federal complaint and filed a motion to dismiss (on bases other than lack of subject matter jurisdiction). In his answer,

Petitioner, Kearney, asserted the affirmative defense that Viacom failed to join a necessary and indispensable party to the action (namely, Petitioner, Taylor Forge). Kearney also filed a third-party complaint against Conolog Corporation ("Conolog"), a Delaware corporation and the owner of a neighboring site, alleged by Viacom to be responsible for causing some or all of the contamination at the Taylor Forge Site. Conolog, in turn, filed a fourth-party contribution action against Taylor Forge. Taylor Forge answered that contribution claim and asserted the affirmative defense of failure to join a necessary and indispensable party to the action. Shortly thereafter, Petitioners moved to dismiss the Federal Action based on the fact that Taylor Forge was, and always had been, an indispensable party defendant to the case, the joinder of which would deprive the court of subject matter jurisdiction.

The District Court agreed, referencing, among other things, the Contract which is replete with obligations running to and from Taylor Forge, notwithstanding the fact that Taylor Forge, a Delaware corporation created by Viacom's lawyers exclusively for the purpose of the sale, was not a signatory. (L.App. at L-65).[2] Taylor Forge was the principal party injured by

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[2] Virtually every page of the contract contains a reference to the contractual obligations running to/from Taylor Forge. The phrase "Buyer shall cause the corporation "[i.e. "[Kearney] shall cause [Taylor Forge],"] appears throughout the Contract. See, for example, ¶¶ 2.1, 2.2, 6.1, 6.4, 6.6, 7.6, 7.7, 8.4, 9.1, 9.3, 9.5, 9.9 (iii) and (iv), 9.10(iii) (a) and (b) 9.12, 10.1) (L.App. at L-1 to L-59). In addition, various portions of the contract explicitly state the rights and obligations held by Taylor Forge. See, for example, ¶ 7.3 which states that "[Viacom] shall be solely responsible for, and shall (continued...)

Viacom's 16 year delay in cleaning up the site.[3]

These parties have been actively litigating the Environmental Issue in the reinstated NJ State Action where no jurisdictional defects exist. Also, subsequent to the District Court's dismissal of the Federal Action, Viacom filed a declaratory judgment action in New Jersey state court against its insurers in an effort to obtain reimbursement from them for the same sums it seeks to recoup from Petitioner, Kearney, in the Federal Action. The action was filed in Somerset County on the basis that the Taylor Forge site was located there. The site-specific issues in that case overlap those in the NJ State Action.

Viacom appealed the District Court's dismissal, and the Second Circuit vacated the District Court's decision based entirely upon its interpretation and application of 28 U.S.C. 1367, the Supplemental Jurisdiction Statute (the "SJ Statute"), a point never raised before the District Court judge. Viacom argued the applicability of the SJ Statute for the first time in its appeal of the District Court's decision.

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[2](...continued)
indemnify and hold [Kearney] and [Taylor Forge] harmless against, all product liability claims..." (L.App. at L- 34) and ¶ 7.4 which provides similar indemnification language. (L.App. at L-34). Also see ¶ 7.8 which permits Kearney and Taylor Forge to control the defense of certain litigation. (L.App. at L-40). Finally, see ¶ 9.2(b)(3)(L.App. at L-45), and ¶ 9.2(ii) (L.App. at L-47).

[3] These include interference with its business operations, damage to the value of the property (owned by Taylor Forge), inability to obtain affordable financing, exorbitant sewer charges incurred because of the never ending environmental work, etc.

ARGUMENT FOR GRANTING WRIT

OVERVIEW

Petitioners request that this Court grant the within writ because the Second Circuit's decision: (a) is in substantial conflict with this Court's precedent concerning diversity, indispensable party joinder requirements, and realignment of parties according to their actual interests in the case; (b) is in conflict with recent decisions of other United States Courts of Appeals concerning the proper interpretation and application of the SJ Statute; and (c) presents an important question of federal law that has not been, but should be, settled by this Court.

The Second Circuit's decision in this matter conflicts with United States Supreme Court decisions including Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); Shields v. Barrow, 58 U.S. (17 How.) 130 (1854); Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941); and Owen Equip. & Erection Co. v. Kroger, 437 U.S. 635 (1978). Further, it is in conflict with decisions of the Second Circuit, including E.R. Squibb & Sons v. Accident & Cas. Ins. Co., 160 F.3d 925 (2d Cir. 1998); Lewis v. Odell, 503 F.2d 445, 447 (2d Cir. 1974); and Maryland Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 621 (2d Cir.), cert. denied, 513 U.S. 1052, 115 S.Ct. 655 (1994). As emphasized by prior decisions of the Second Circuit and by this Court, the existence of "'subject matter jurisdiction is an unwaivable sine qua non for the exercise of federal judicial power.'" Squibb at 929.

The proper interpretation and application of the SJ Statute in the diversity context involves a question of exceptional importance to all federal courts. In adopting

28 U.S.C. 1367, Congress could not have intended, sub silentio, to overrule 190 years of Supreme Court precedent regarding the complete diversity requirements of Strawbridge, supra, the joinder/indispensable party requirements of Indianapolis, supra and Shields, supra, and the rejection of jurisdictional manipulation, Owen Equip. & Erection Co., supra. While this Court has not yet addressed the application of the SJ Statute to complete diversity and party joinder situations, recent circuit court decisions have construed the SJ Statute inconsistently. (See e.g. Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996); Shanaghan v. Cahill, 58 F.3d 106 (4th Cir. 1995); Leonhardt v. Western Sugar Co., 160 F.3d 631 (10th Cir. 1998); Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999); In re: Abbott Laboratories, Inc., 51 F.3d 524 (5th Cir. 1995).[4] A definitive interpretation of the SJ Statute in cases founded solely on diversity jurisdiction, such as this one, is ripe for decision by this Court.

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[4] This Court granted certiorari for Abbott (on diversity subject matter jurisdictional "amounts in controversy" grounds, 145 L. Ed. 2d 406). However, the only decision rendered was an affirmance, without opinion, in a 4/4 split (one recusal) of the underlying substantive opinion. 529 U.S. ___, 146 L.Ed.2d 306 (2000).

ARGUMENT I

THE SECOND CIRCUIT MISCONSTRUED THE SUPPLEMENTAL JURISDICTION STATUTE TO ELIMINATE INDISPENSABLE *PARTY* JOINDER REQUIREMENTS

The Second Circuit held that it need not consider whether Taylor Forge was a "necessary" or "indispensable" party because "we conclude that Taylor Forge was already present in the litigation and could have joined with Kearney in asserting its 22 claims against Viacom without destroying the court's subject matter jurisdiction." (App. A at 10a). The sole basis for this conclusion was the SJ Statute. (App. A at 3a). That conclusion (1) is inconsistent with this Court's precedent regarding cases, such as this one, which are founded solely on diversity jurisdiction and (2) is inconsistent with the intent of the SJ Statute, as reflected in its legislative history.

Congress enacted the SJ Statute in 1990 in direct response to Finley v. United States, 490 U.S. 545 (1989). Finley, a federal question case, held that federal courts lacked subject matter jurisdiction over non-diverse defendants against which plaintiffs had no "federal question" claims, even if the claims against those parties arose out of the same operative facts. Therefore, Finley virtually ensured piecemeal, duplicative litigation in different forums. To avoid this result in the future, this Court invited Congress to enact legislation allowing the exercise of such "pendent" jurisdiction. The SJ Statute was the Congressional response to that invitation. H.R. Rep. No. 734, 101st Cong., 2d Sess. 28 (1990), reprinted in 1990 U.S.C.C.A.N. 6874.

The SJ Statute provides, in pertinent part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have **original jurisdiction**, the district courts shall have supplemental jurisdiction over all other **claims** that are so related to the claims in the action within such **original jurisdiction** that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include **claims** that involve the joinder or intervention of additional parties;

(b) In any civil action **of which the district courts have original jurisdiction founded solely on section 1332** of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over **claims** by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over **claims** by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such **claims** would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a **claim** under subsection (a) if-

(1) the **claim** raises a novel or complex issue of State law,

(2) the **claim** substantially predominates over the **claim** or **claims** over which the district court has original jurisdiction,

(3) the district court has dismissed all **claims** over which it had original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction... [Emphasis added]. (App. D at 37a-38a).

The following basic tenets are critical to the proper interpretation and application of the Statute. Federal courts have limited original subject matter jurisdiction. Healy v. Ratta, 292 U.S. 263, 270 (1934). That original subject matter jurisdiction falls into one of two categories: federal question jurisdiction (the type examined in Finley), and diversity jurisdiction (created pursuant to 28 U.S.C. 1332 and at issue in this matter).

This Court's precedent uniformly provides that before supplemental jurisdiction can be asserted, a federal court must first legitimately have original subject matter jurisdiction, based either on a federal question (i.e. based on a "**claim**") or on complete diversity (i.e. based on the citizenship of a "**party**" not a claim). (See **bold** in the Statute, above). Strawbridge, supra; Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Zahn v. Int'l Paper Co., 414 U.S. 291 (1973); Owen Equip. & Erection Co., supra.

This Court has never permitted the doctrine of supplemental jurisdiction to be used, in reverse, to create

original jurisdiction over a "party" not otherwise subject to the **original** jurisdiction of federal court. Yet, the Second Circuit's failure to embrace the party (not claim) joinder requirements mandated in an appropriate exercise of original diversity jurisdiction, yields that unfortunate result.

Both the text and legislative history of the Statute make it clear that while Congress intended to overrule Finley, Congress did not intend to eliminate the complete diversity/original jurisdiction requirements of 28 U.S.C. 1332, nor compulsory party joinder rules. As stated by Professor James E. Pfander, in an Article entitled "Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism", 148 U. Pa. L. Rev. 109, 113 (1999):

> ...Congress, in revising and consolidating the laws, does not intend to change their effect unless such intention is 'clearly expressed.' Finley, 490 U.S. at 554.... Such a rule establishes a regime of continuity with the past...'the dominant theme running through most interpretive [canons] that actually influence outcomes is that close questions of construction should be resolved in favor of continuity and against change')... *statutes rarely produce unannounced but revolutionary changes in the law.*" [Emphasis Added].

In a recent "federal question" analysis of the Statute, this Court made it clear that "original" jurisdiction is still a condition precedent to the exercise of supplemental jurisdiction. Chicago v. Int'l Col. of Surgeons, 522 U.S. 156 (1997). In Chicago, this Court held that 28 U.S.C. 1367(a) provided supplemental

jurisdiction over pendent state law claims. However, the Court was careful to note that its decision addressed supplemental jurisdiction on federal question grounds only. The majority decision (with which the dissent disagreed because they foresaw terrible diversity jurisdiction ramifications), clarified that the Statute's application in a diversity context might be very different:

> ...[t]he dissent's candid misgivings about attempting to square its position with the text of the jurisdictional statutes...are understandable. And the failure to come to grips with the text of 1367 explains the dissent's repeated assumption...that the jurisdictional analysis of diversity cases would be no different. But to decide that state law claims for on-the-record review of a local agency's decision fall within the district court's 'supplemental' jurisdiction under 1367(a), does not answer the question, nor do we, whether those same claims, if brought alone, would substantiate the district courts' 'original' jurisdiction over diversity cases under 1332... 522 U.S. 156, ___, 139 L.Ed.2d at 540. [Emphasis added].

If the Second Circuit's decision is permitted to stand, complete diversity requirements, which concerned both the Chicago dissent and majority, will be eviscerated. Federal courts will be compelled to try every contract, tort, and purely state question case brought before them since plaintiffs can obtain diversity jurisdiction by the expedient of naming only diverse parties as defendants, regardless of indispensable party joinder rules. Those joinder rules prohibit entities, such as Viacom, from purposely and insupportably excluding a necessary and

indispensable party from federal litigation in order to avail itself of the already overloaded federal court system.[5]

The Chicago Court's interpretation is in keeping with more recent decisions from the circuits. See, for example, Leonhardt v. Western Sugar Co., 160 F.3d 631 (10th Cir. 1998); and Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999)(which held that the SJ Statute maintains traditional diversity rules/requirements).[6]

Aside from this precedent, the SJ Statute's legislative history makes it clear that courts should not

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[5] See Allendale Mut. Ins. Co. v. Excess Ins. Co., Ltd., 62 F. Supp. 2d 1116 (S.D.N.Y. 1999), in which the same district court which dismissed the within action squarely addressed the application of the SJ Statute in a "pure diversity" context. The District Court dismissed that case, noting that jurisdiction is "not a game." Although defendants had proposed several creative devices to avoid dismissal, the trial court (which already had tried that case) rejected them, noting that Congress sought to assure that ordinary contract and tort litigation would not be diverted to federal courts by litigants using collusive or improper devices to create the appearance, but not the substance, of federal diversity jurisdiction. Although Viacom did not argue the operation of the SJ Statute to the District Court, it is clear from the virtually simultaneous decision rendered in Allendale that the District Court was cognizant of the Statute at the time that it dismissed the within matter on subject matter jurisdictional grounds. The Second Circuit in this case should have deemed that Viacom waived the argument by not raising it in the District Court.

[6] Circuits holding to a rigid textual approach ("if it is not in the actual words of the Statute, it cannot still be good law") include Stromberg Metal Works, Inc. v. Press Mechanical, Inc., supra; Shanaghan v. Cahill, supra and In re: Abbott Laboratories, Inc., supra.

exercise supplemental jurisdiction in diversity cases "when exercising jurisdiction over such claims would be inconsistent with the jurisdictional requirements of 1332. In both cases, the district courts, as under current law, would have discretion to decline supplemental jurisdiction in appropriate circumstances." H.R. Rep. No. 734, 101st Cong., 2d Sess. 28 (1990), reprinted in 1990 U.S.C.C.A.N. 6874.

In order to avoid results such as that reached by the Second Circuit, the American Law Institute has recommended amending the language of the Statute to state that "the court shall have jurisdiction of the supplemental claim only if it...(3) has been joined to the action by a party whose joinder is not indispensable to the litigation of the action." The American Law Institute, Federal Judicial Code Revision Project, Tentative Draft No. 2, April 14, 1998, at 58. [Emphasis Added].

The Second Circuit's reliance on Wisconsin Dept. of Corrections v. Schact, 524 U.S. 381, 141 L.Ed.2d 364 (1998) to support its application of the SJ Statute was clearly misplaced. Wisconsin was a removal case based on a federal question and the operation of the Eleventh Amendment. It did not involve the utilization of the SJ Statute to obtain "supplemental jurisdiction" over claims otherwise barred by complete diversity/indispensable party requirements. Notably, the Wisconsin Court discussed and distinguished "original" jurisdiction in federal question versus diversity cases:

> This case differs significantly from a diversity case with respect to a federal district court's **original** jurisdiction. The presence of the non-diverse party automatically destroys original jurisdiction: No

> party need assert the defect. No party can waive the defect, or consent to jurisdiction. [Citations omitted]. No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own [citations omitted]. 524 U.S. __, 141 L.Ed.2d at 372. [Emphasis in original].

To avoid rendering these unanimous words meaningless, this Court should overturn the Second Circuit's decision and reinstate the decision of the District Court.

ARGUMENT II

THE SECOND CIRCUIT INCORRECTLY CONCLUDED THAT TAYLOR FORGE'S HAPPENSTANCE APPEARANCE IN THE LITIGATION AS A FOURTH-PARTY CONTRIBUTION DEFENDANT PRESERVES THE DEFECTIVE ORIGINAL JURISDICTION

The incidental appearance of Taylor Forge as an impleaded fourth-party defendant on a contribution claim brought by third-party defendant, Conolog, cannot preserve defective original jurisdiction or side-step party joinder requirements.

When Rule 19 speaks in terms of an "absent" party, it means an absent "plaintiff" or "defendant." Otherwise, Rule 19 would have little meaning, a fact implicitly recognized in Indianapolis, 314 U.S. 63, which held that federal jurisdiction is not discretionary and may not be conferred upon the court by the parties' self-alignment. As stated by the Court, "It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings, and arrange parties according to their sides in the dispute.'" Id. at 69. If diversity is defeated by the realignment process, then a court must dismiss the entire case.

In rendering its decision, the Second Circuit completely ignored the doctrine of realignment, which extends to third and fourth-party defendants when they are indispensable parties. See, e.g., Casualty Indem. Exch. v. High Croft Enters., 714 F. Supp. 1190 (S.D. Fla. 1989)(court realigned a third-party defendant and dismissed the action); Leick v. Schnellpressenfabrik AG Heidelberg, 128 F.R.D. 106, 109 (S.D. Iowa 1989)(court held that a college was an indispensable party, and noted

that even if the case could have proceeded with the college as a third-party defendant, the court would have been required to realign the parties according to their interests and dismiss for lack of complete diversity); Aetna Cas. & Sur. Co. v. Quixx Temporary Servs., 1994 W.L. 162587 (E.D. La. 1994)(court rejected an initial ruling that since the party in question was already a third-party defendant, Rule 19 was inapplicable, condemned the manipulation of diversity requirements, cited the existence of a parallel state court action, realigned the third-party defendant, and dismissed the case). The District Court properly determined that Taylor Forge (a fourth-party defendant) was an indispensable party **defendant** and dismissed the case.

The basis of the Second Circuit's decision not to realign Taylor Forge as a party defendant hinges on one sentence from a 1992 article, cited for the proposition that "[b]ecause a third-party defendant is not a plaintiff, the restrictions of 1367 (b) do not apply." (App. A at 13a-14a). The quotation makes no reference, however, to principles of party joinder and realignment. That discussion appears elsewhere in the article where the author makes it clear that the SJ Statute does not create supplemental jurisdiction over parties which should have been named as defendants in the first place, such as Taylor Forge:

> ...[i]t must be clear that the basis for joinder of the Rule 19 defendant is not that the plaintiff should have named the party as an additional defendant as part of the plaintiff's affirmative claim for relief. Consider, for example, the classic compulsory joinder case of Shields v. Barrow. In this case, the plaintiff sued only the diverse parties to a

> multiparty contract. The Supreme Court ordered the dismissal of the case because of the plaintiff's failure to join the non-diverse parties to the contract. Section 1367(b) would not alter this result. Supplemental jurisdiction would not extend to these non-diverse parties, even though they would align as defendants and satisfy the requirements of Rule 19. Section 1367(b) would prohibit supplemental jurisdiction because the theory of joinder would have been that the additional parties should have been joined as additional defendants as part of the plaintiff's affirmative claim for relief. Denis F. McLaughlin, The Federal Supplemental Jurisdiction Statute-A Constitutional and Statutory Analysis, 24 Ariz. St. L.J. 849, 957 (1992). [Emphasis added].

Prior to this decision, the Second Circuit had consistently embraced Indianapolis' doctrine of realignment of parties "according to their real interests so as to produce an actual collision of interests," Lewis, 503 F.2d at 447; Maryland Cas. Co., 23 F.3d at 621, and avoid manipulation of alignment to manufacture diversity jurisdiction. Indianapolis at 69-70. The Second Circuit provided no explanation for its departure from its own, as well as this Court's precedent.

Applying precedent from the Supreme Court and prior precedent from the Second Circuit, compels the realignment of Taylor Forge as a direct party defendant, destroying original complete diversity. As recognized by the District Court, Taylor Forge is principally adverse to Viacom, not to the third-party defendant, Conolog, which impleaded Taylor Forge solely for contribution and common law indemnification. Taylor Forge owns the

property damaged by Viacom and its environmental consultants and advisors; Taylor Forge must be contractually indemnified by Viacom for most, if not all, of the groundwater monitoring and sampling costs (Contract, 7.7(ii)) (L.App. at L-38) which Viacom, in turn, seeks to recoup from Kearney in the Federal Action.[7]

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[7] In fact, Viacom is now seeking to recoup this sum twice in two separate forums: once from Kearney in the Federal Action and once from Viacom's insurers in a New Jersey declaratory judgment action. In both cases, Viacom has "chosen" not to name Taylor Forge (whose contaminated site is directly in issue) as a party. As stated in Lane v. Birnbaum, 910 F. Supp. 123, f.n. 6 (S.D.N.Y. 1995), Viacom's "choice" not to file claims against Taylor Forge does not preserve diversity.

ARGUMENT III

THE SECOND CIRCUIT'S ATTEMPTED PRESERVATION OF DIVERSITY JURISDICTION BY PRECLUDING VIACOM FROM ASSERTING CLAIMS AGAINST TAYLOR FORGE ABROGATES THE STATUTE'S LITERAL TEXT AND INTENT

A major component of the Second Circuit's decision was that court's ruling that:

> ...Viacom's complaint states no claim against Taylor Forge in federal court, just as it asserted no (counter)claims against Taylor Forge in the New Jersey action. Indeed, Viacom stated at oral argument that it waives any potential claims (or counterclaims) against Taylor Forge in federal court. The exercise of supplemental jurisdiction over Taylor Forge's claims against Viacom therefore threatens no prejudice to Viacom. (App. A at 15a-16a).

The Second Circuit got it backwards. The SJ Statute's concern is not whether anyone will be prejudiced by the exercise of supplemental jurisdiction. That question should have been (but was not) answered by the Second Circuit as part of the threshold analysis of whether the court ever legitimately had original jurisdiction in the first instance (i.e. was a non-diverse indispensable party excluded?).

Putting aside the prejudice issue (concerningwhich the Second Circuit should have addressed the prejudice to Petitioner, Taylor Forge, not Respondent, Viacom), this Court should address several serious concerns raised by

the Second Circuit's decision. First, Viacom's promise of asserting "no claims" against Taylor Forge rings hollow. In order to avail itself of "supplemental" jurisdiction, Viacom will force Taylor.Forge to assert claims against Viacom in the Federal Action and then respond with "affirmative defenses" as it has done in the reinstated NJ State Action. Viacom, however, will not permit Taylor Forge to obtain a default judgment against it in either jurisdiction. Yet, a default judgment is the only mechanism that, in reality, will avoid direct confrontations between Taylor Forge and Viacom (whether they are called claims, counter-claims, or affirmative defenses).[8]

This type of contorted, meaningless "waiver" in order to preserve otherwise defective jurisdiction was never intended by the drafters of the SJ Statute. Congress' aim was not to encourage manipulation of jurisdictional requirements and ensure piecemeal litigation, but to discourage such tactics.

Unfortunately, the Second Circuit's decision virtually ensures that both of these undesirable results will occur. Viacom will force Taylor Forge, a non-diverse party, to bring all of its claims against Viacom (or risk being barred from so doing), and Viacom will defend itself against those claims with vigor. Taylor Forge, however, wishes to continue its litigation in the reinstated NJ State

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[8] Of course, if Viacom does permit such a default judgment, then its case against Kearney is over. The reason is that if Petitioner, Taylor Forge succeeds on its claims (which involve, among other things, the interpretation and application of all of the Contract language at issue), no indemnification claims against Petitioner, Kearney, will remain.

Action since (a) its site is in New Jersey; (b) the Environmental Issues are controlled by a New Jersey statute and regulatory agency; and (c) Viacom filed its insurance declaratory judgment action (involving the Taylor Forge Site) in the same New Jersey county, and Taylor Forge intends to intervene in and/or consolidate at least the substantial overlapping issues in Viacom's New Jersey insurance declaratory judgment action with Taylor Forge's own NJ State Action.[9]

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[9] In its opinion, at footnote 4 (App. A at 15a), the Second Circuit implies that Viacom is also precluded from asserting claims against Conolog, a third-party defendant which is also a Delaware corporation. Viacom has already asserted such claims in the reinstated NJ State Action and presumably will do so in the Federal Action too, if the action proceeds.

ARGUMENT IV

IT IS THE *DISTRICT COURT*, NOT THE APPELLATE TRIBUNAL, WHICH HAS THE DISCRETION TO DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION

Even if the Second Circuit were correct that the SJ Statute could supply supplemental jurisdiction over Petitioner, Taylor Forge, the Second Circuit did not have the statutory authority to determine that supplemental jurisdiction would be exercised. 28 U.S.C. 1367(c) makes it clear that it is the District Court, not the Second Circuit, which (as the trier of fact) is endowed with the discretion to decide whether, and under what circumstances, to exercise supplemental jurisdiction under the SJ Statute. Although the Second Circuit gives lip service to the standard of review, i.e. abuse of discretion, in fact it conducted a de novo review. The SJ Statute does not vest the appellate court with such authority to review "de novo" a discretionary, fact-sensitive decision that was properly in the province of the district court.

As held by the Supreme Court in Chicago, supra overturning the Seventh Circuit, and reinstating the district court's decision:

> Our decisions have established that pendent jurisdiction 'is a doctrine of discretion, not of plaintiff's right' Gibbs, 383 US, at 726... and that **district courts** can decline to exercise jurisdiction over pendent claims for a number of valid reasons, id. ...Accordingly, we have indicated that '**district courts** [should] deal with cases involving pendent claims in the manner which best serves the

> principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine.' 522 U.S. __, 139 L.Ed.2d at 540. [Emphasis added].

As it did in Chicago, this Court should reinstate the District Court's dismissal decision as a proper exercise of its discretionary authority.

CONCLUSION

For all of the reasons set forth above, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Second Circuit and, ultimately, to reverse the decision of the Second Circuit and reinstate the decision of the District Court dismissing the within matter on the basis of the absence of original subject matter jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: January 12, 2000 Decided: May 19, 2000)

Docket No. 99-7797

VIACOM INTERNATIONAL, INC.,
Plaintiff-Counter-Defendant-Appellant,

v.

Michael W. KEARNEY,
Defendant-Third-Party-Plaintiff-Counter-Claimant- Appellee,

CAMP, DRESSER AND MCKEE,
Third-Party-Defendant,

CONOLOG CORPORATION,
Third-Party-Defendant-Counter-Claimant-Fourth-Party-Plaintiff,

TAYLOR FORGE STAINLESS, INC.,
Fourth-Party-Defendant.

Before: NEWMAN, WALKER, and SOTOMAYOR, *Circuit Judges*.

Appeal from an order of the United States District court for the Southern District of New York (Shira A. Scheindlin, Judge) granting defendant/appellee Kearney's motion to dismiss the action pursuant to Fed. R. Civ. P. 19 for failure to join an indispensable party. We hold that the district court erred in granting defendant's motion because the purportedly indispensable party Taylor Forge Stainless, Inc. was already present in the case as a fourth-party defendant and could file any claims necessary to protect its interests under the court's supplemental jurisdiction without destroying diversity jurisdiction.

Vacated and remanded.

WILLIAM R. MAGUIRE, Hughes, Hubbard & Reed LLP, New York, NY *for plaintiff-counter-defendant-appellant.*

WILLIAM A. DREIER, Norris, McLaughlin & Marcus, Somerville, NJ (M. Karen Thompson and Martha N. Donovan, on the brief), *for defendant-third-party-plaintiff-counter-claimant-appellee.*

SOTOMAYOR, *Circuit Judge*:

Plaintiff-appellant Viacom International, Inc. ("Viacom") brought this diversity action in federal court

against defendant-appellee Michael W. Kearney ("Kearney") seeking indemnification for costs arising from the environmental cleanup of the facilities at Taylor Forge Stainless, Inc. ("Taylor Forge"). Kearney filed counterclaims against Viacom and third-party complaints against two additional parties, one of whom filed a fourth-party complaint against Taylor Forge.

On June 21, 1999, the district court granted Kearney's motion to dismiss the action pursuant to Fed. R. Civ. P. 19, holding that Taylor Forge was a necessary and indispensable party who could not join in Kearney's counterclaims against Viacom without also destroying the court's diversity jurisdiction. *See Viacom Int'l, Inc. v. Kearney*, 190 F.R.D. 97, 102 (S.D.N.Y. 1999). We find that the district court erred in granting defendant's motion to dismiss because Taylor Forge was already present in the case as a fourth-party defendant and could file any claims necessary to protect its interests under the court's supplemental jurisdiction without destroying diversity jurisdiction.

BACKGROUND

Prior to October 1984, Gulf & Western Manufacturing Company ("G & W") owned Taylor Forge, a steel manufacturing business located in Somerville, New Jersey and incorporated under the laws of Delaware. On October 26, 1984, G & W concluded an agreement ("October Agreement") with Michael Kearney--Taylor Forge's manager--whereby G&W sold all of its shares in Taylor Forge to Kearney. In order to obtain regulatory approval for the sale, G&W and Kearney entered into a

consent order with the New Jersey Department of Environmental Protection ("NJDEP") which provided that G&W would undertake a NJDEP-approved cleanup plan for the Taylor Forge facilities. Under the October Agreement, G&W assumed the responsibility for implementing the cleanup plan and Kearney agreed to indemnify G&W for third-party costs and expenses in excess of $1.75 million.

In August 1993, Kearney and Taylor Forge sued G&W's successor, Paramount Communication Realty Corporation ("Paramount"), in New Jersey state court. The complaint sought declaratory and other relief, claiming, *inter alia*, that: (1) G&W procured Kearney's contractual indemnity commitment by fraud and misrepresentation regarding the extent of the environmental contamination and cleanup costs; and (2) the cleanup plan had not yet been implemented, thus damaging the value of Taylor Forge's business. In May 1994, the parties agreed to dismiss the New Jersey action, without prejudice, in order to explore the possibility of settlement.

On September 3, 1998, Viacom--the corporate successor of G&W and Paramount--filed this diversity action against Kearney in the United States District Court for the Southern District of New York. Viacom's complaint stated claims against Kearney for: (1) breach of his contractual indemnity obligations under Section 7.7(iii) of the October Agreement; (2) breach of Section 7.7(i) of the October Agreement, which required Kearney to prevent Taylor Forge from further contaminating the site; and (3) declaratory relief requiring Kearney to indemnify

Viacom for all existing and future costs of implementing the cleanup plan in excess of $1.75 million. Significantly, Viacom's complaint stated no claim against Taylor Forge.

On November 30, 1998, Kearney answered and filed 22 counterclaims against Viacom. The thrust of Kearney's contentions was that: (1) G&W misrepresented the extent of the contamination and the projected cost and time required to clean up the Taylor Forge site; (2) G&W and its successors failed to carry out the NJDEP-approved cleanup plan in a diligent and timely manner; and (3) the cleanup costs covered by Kearney's indemnification duty refer only to the actual physical remediation of the facility and exclude tests, studies, evaluations, plans, and other similar expenses that Viacom and its predecessors incurred.

On November 20, 1998, Kearney filed a third-party complaint against Conolog Corporation ("Conolog"), Taylor Forge's neighbor, alleging that Conolog had contaminated the Taylor Forge site and was therefore liable for contribution. On March 19, 1999, Kearney filed a second third-party complaint against Camp, Dresser & McKee ("CDM"), Viacom's environmental consultant who had managed Viacom's cleanup operations at the Taylor Forge site. Kearney alleged that CDM's misfeasance exacerbated the site's environmental problems and frustrated the normal business operations of Taylor Forge. Finally, Conolog filed a fourth-party complaint against Taylor Forge on March 15, 1999, seeking contribution

and indemnification.[1] Taylor Forge answered Conolog's complaint on April 15, 1999, thus becoming a fourth-party defendant in the instant litigation. Significantly, Taylor Forge has not filed any claims against any of the parties in this federal action.

Following the filing of this federal action, on November 20, 1998, Kearney and Taylor Forge reinstated their (amended) complaint in New Jersey state court against Viacom, asserting 22 claims that exactly mirrored the 22 counterclaims which Kearney filed in this action against Viacom. In April 1999, Kearney filed a motion to dismiss this action pursuant to Fed. R. Civ. P. 19, arguing that Taylor Forge was a necessary and indispensable party to the litigation.

In an opinion and order dated June 21, 1999, the district court granted Kearney's motion to dismiss, finding that Taylor Forge was a necessary and indispensable party under Rule 19 who could not join in Kearney's counterclaims against Viacom because doing so would destroy the court's diversity jurisdiction. *See Viacom*, 190 F.R.D. at 102. Viacom appeals from that order.

DISCUSSION

Fed. R. Civ. P. 19 sets forth a two-step test for determining whether the court must dismiss an action for failure to join an indispensable party. First, the court must determine whether an absent party belongs in the

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[1] Conolog also filed a counterclaim against Kearney and a third- party claim against Viacom.

suit, *i.e.*, whether the party qualifies as a "necessary" party under Rule 19(a). *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 124 (1968) (" 'Persons having an interest in the controversy, and who ought to be made parties ... are commonly termed necessary parties ....' ") (quoting *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1854)). Rule 19(a) provides that the absent party should be joined, if feasible, where:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). If a party does not qualify as necessary under Rule 19(a), then the court need not decide whether its absence warrants dismissal under Rule 19(b). *See Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1123 (2d Cir. 1990).

But where the court makes a threshold determination that a party is necessary under Rule 19(a), and joinder of the absent party is not feasible for jurisdictional or other reasons, *see* Fed. R. Civ. P. 19(b) (stating that, if an absent party satisfies the Rule 19(a) standard, a court must next assess the feasibility of

joinder before conducting a Rule 19(b) analysis); 4 *Moore's Federal Practice* § 19.02[3][b] (3d ed. 1999) (identifying situations where joinder of an absent party is not feasible), the court must finally determine whether the party is "indispensable." If the court determines that a party is indispensable, then the court must dismiss the action pursuant to Rule 19(b). *See ConnTech Dev. Co. v. University of Conn. Educ. Properties, Inc.*, 102 F.3d 677, 681-82 (2d Cir.1996) (citing *Patterson*, 390 U.S. at 108-25). Rule 19(b) provides:

> [T]he court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

Applying this analytical framework, the district court first concluded that Taylor Forge was a "necessary" party under Rules 19(a)(2)(i) and (a)(2)(ii):[2]

> While it is true that the only parties to the [October] Agreement are Kearney and Viacom, Taylor Forge is directly implicated as an active, if not the primary, participant in the transaction.... Therefore, Taylor Forge's non- party status under the Agreement should not bar its joinder as a necessary party.
>
> .... Taylor Forge has a substantial legal interest in the environmental management of its own facility and the disposition of the action in its absence may as a practical matter impede or impair its ability to protect that interest....
>
> .... In addition, Taylor Forge is seeking injunctive relief on nearly identical grounds from these same parties in the parallel state action, thus causing a substantial risk that multiple parties may incur inconsistent obligations should this action continue....

Viacom, 190 F.R.D. at 101 (citations omitted).

Upon finding that Taylor Forge qualified as a necessary party, the district court next determined that, for jurisdictional reasons, it would not be feasible for Taylor Forge to join with Kearney in his counterclaims

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[2] The district court did not consider whether Taylor Forge qualified as a necessary party under Rule 19(a)(1) and the parties concede that the issue is not before this Court.

against Viacom. Specifically, the district court concluded that "the joinder of Taylor Forge, which like Viacom is a Delaware-chartered corporation, would deprive this Court of its jurisdiction" under 28 U.S.C. § 1332. *Id.* at 100. Finally, the district court dismissed the action under Rule 19(b) because it found that "Taylor Forge is an indispensable party to this action and it must be joined." *Id.* at 102 ("Because its joinder will destroy diversity of citizenship, this Court no longer has subject matter jurisdiction over the dispute.").

This Court reviews a district court's Rule 19 dismissal under the abuse of discretion standard. *See Jota v. Texaco Inc.*, 157 F.3d 153, 161 (2d Cir.1998) (citing *Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 75 (2d Cir.1984)). Moreover, "[w]hen reviewing a district court's determination of its subject matter jurisdiction, we review factual findings for clear error and legal conclusions *de novo*." *ConnTech*, 102 F.3d at 681 (quoting *McCarthy v. Navistar Fin. Corp.*, 59 F.3d 9, 11 (2d Cir. 1995)).

Reviewing this matter on appeal, we find a serious question as to whether Taylor Forge qualifies as a "necessary" party under Rule 19(a) and, *a fortiori*, whether Taylor Forge is an "indispensable" party within the meaning of Rule 19(b). We need not decide these issues here, however, because we conclude that Taylor Forge was already present in the litigation and could have joined with Kearney in asserting its 22 claims against Viacom without destroying the court's subject matter jurisdiction. In other words, we hold that, as a

jurisdictional matter, it is feasible for Taylor Forge to file any claims necessary to protect its interests in this case.

Viacom brought its original complaint against Kearney under 28 U.S.C. § 1332, which provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs, and is between ... citizens of different States." 28 U.S.C. § 1332(a)(1). The statute further provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." *Id.* § 1332(c)(1). Because Viacom and Kearney are citizens of different states[3] and the amount in controversy exceeds $75,000, Viacom's original complaint--and Kearney's counterclaims--clearly fell within the district court's diversity jurisdiction. *See Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 388, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) ("A case falls within the federal district court's original diversity jurisdiction only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State.") (internal quotation marks omitted).

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[3] The parties do not dispute the citizenship of the various entities in this case. Plaintiff Viacom is a Delaware corporation with its principal place of business in New York and defendant Kearney is a citizen of Florida. Third-party defendant CDM is a citizen of Massachusetts and third-party defendant Conolog is a Delaware corporation with its principal place of business in New Jersey. Finally, fourth-party defendant Taylor Forge is a Delaware corporation with its principal place of business in New Jersey.

In its June 19, 1999 opinion, the district court concluded that, if Taylor Forge were to join with Kearney in asserting claims against Viacom, such participation in the lawsuit would divest the court of subject matter jurisdiction. We disagree. Reviewing this legal question *de novo*, we find that the district court could have exercised supplemental jurisdiction over Taylor Forge's claims against Viacom without destroying the court's original diversity jurisdiction.

In cases where a district court has original jurisdiction, it may also exercise "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Section 1367(b) limits the scope of that jurisdictional grant in diversity cases, providing that:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims *by plaintiffs* against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined *as plaintiffs* under Rule 19 of such rules, or seeking to intervene *as plaintiffs* under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistentwith the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(b) (emphasis added).

Significantly, § 1367(b) reflects Congress' intent to prevent original plaintiffs--but not defendants or third parties--from circumventing the requirements of diversity. *See* H.R. Rep. No. 101-734, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 (explaining that the purpose of § 1367(b) is to prevent "*plaintiffs* [from being able] to evade the jurisdictional requirement of 28 U.S.C. § 1332 by the simple expedient of naming initially only those defendants whose joinder satisfies section 1332's requirements and later adding claims not within original federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis") (emphasis added); *see also* David D. Siegel, Practice Commentary, *reprinted in* 28 U.S.C.A. § 1367, at 832 (West 1993) (noting that § 1367(b) "is concerned only with efforts of a *plaintiff* to smuggle in claims that the *plaintiff* would not otherwise be able to interpose.... The repetition of the word 'plaintiffs' at several rule-citing junctures in subdivision (b) makes this clear.") (emphases added).

By contrast, "[b]ecause defendants are involuntarily brought into court, their [claims a]re not deemed as suspect as those of the plaintiff, who is master of his complaint." *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 493 (4th Cir. 1998); *see also Associated Dry Goods*, 920 F.2d at 1126 (noting that "ancillary jurisdiction should be more readily available to one haled into court against his or her will than to a plaintiff who has chosen the forum for litigation") (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978)); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute-A Constitutional and Statutory*

Analysis, 24 Ariz. St. L.J. 849, 929 (1992) ("Because a third-party defendant is not a plaintiff, the restrictions of § 1367(b) do not apply.").

Under this analysis, a non-diverse fourth-party defendant such as Taylor Forge may bring claims against plaintiff Viacom ("downsloping claims"), but Viacom may not bring claims--or counterclaims--against Taylor Forge ("upsloping claims"). *Compare Development Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 161 (3d Cir.1995) ("We conclude that § 1367(b) does not deprive the district court of supplemental jurisdiction over a counterclaim or cross-claim raised by an intervening defendant, even where the intervenor shares citizenship with an original party."), *with Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 412 n. 15 (3d Cir.1993) (noting that upsloping Rule 14(a) claims by non-diverse parties destroy diversity). *See also 3 Moore's Federal Practice* §§ 14.41[4][d][iii]-[iv] (noting that supplemental jurisdiction will support downsloping Rule 14(a) claims but will not support upsloping Rule 14(a) claims); 4 *id.* § 19.04[1][b] (explaining that § 1367 "precludes supplemental jurisdiction over claims (1) by *plaintiffs* joined under Rule 19 (necessary parties); (2) by absentees seeking to intervene as *plaintiffs* under Rule 24 (intervention); and (3) by *plaintiffs* against parties joined under Rule 14 (third-party practice or impleader), Rule 19 (necessary parties), Rule 20 (proper parties), or Rule 24 (intervention)") (emphases added).

Accordingly, we find that § 1367(b) poses no bar to the exercise of supplemental jurisdiction over Taylor Forge's downsloping Rule 14(a) claims against Viacom,

and the only issues for adjudication are (1) whether such claims are "part of the same case or controversy" under § 1367(a), and (2) whether § 1367(c) counsels against the exercise of such jurisdiction.[4] *See* 28 U.S.C. § 1367(a), (c).

The § 1367(a) analysis gives us little pause because, just as in the New Jersey action, the substance of Taylor Forge's claims are identical to Kearney's 22 compulsory counterclaims. Therefore, Taylor Forge's claims are, by definition, "part of the same case or controversy." *See Seabrook v. Jacobson*, 153 F.3d 70, 71 (2d Cir.1998) ("Under 28 U.S.C. § 1367(a), federal courts have jurisdiction to decide claims over which they would not otherwise have jurisdiction, if those claims are so related to claims over which they do have jurisdiction that the claims form part of the same case or controversy.").

Furthermore, although § 1367(c) provides that the exercise of supplemental jurisdiction is discretionary, we see no reason for declining to exercise supplemental jurisdiction over Taylor Forge's claims in the instant case. *See generally Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir.1994) (explaining that a district court may decline to exercise supplemental jurisdiction based on "considerations of judicial economy, convenience, and fairness to litigants"). Specifically, we note that Viacom's

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[4] Although not an issue on appeal, we note that this same supplemental jurisdiction analysis would apply to Conolog's downsloping Rule 14(a) claims against Viacom and any other claims between third-party litigants.

complaint states no claim against Taylor Forge in federal court, just as it asserted no (counter)claims against Taylor Forge in the New Jersey action. Indeed, Viacom stated at oral argument that it waives any potential claims (or counterclaims) against Taylor Forge in federal court. The exercise of supplemental jurisdiction over Taylor Forge's claims against Viacom therefore threatens no prejudice to Viacom.[5] Moreover, the exercise of supplemental jurisdiction over Taylor Forge's claims promotes judicial economy because, if this litigation is allowed to proceed, the district court will be required to adjudicate Kearney's 22 (sister) counterclaims against Viacom.[6]

In light of the foregoing, we find that Taylor Forge could have filed any claims against Viacom necessary to protect its interests without destroying the district court's subject matter jurisdiction. This Court has emphasized in the Rule 19 context that " 'the parties actually before the court are obliged to pursue any avenues for eliminating the threat of prejudice.' " *Associated Dry Goods*, 920 F.2d at 1125 (quoting C. Wright and A. Miller, 7 Federal Practice and Procedure § 1608, at 112-13) (emphasis

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[5] The analysis of this case would differ if Viacom had an interest in asserting upsloping claims or counterclaims against Taylor Forge and could not do so.

[6] It would appear that, through the exercise of supplemental jurisdiction over the various third-party claims in this case, this federal action could potentially duplicate the universe of parties and claims before the New Jersey state court and eliminate the need for litigation in dual fora. We express no opinion here regarding the appropriateness of a stay pending resolution of the parties' claims in the New Jersey action.

deleted). In the instant case, we view as dispositive Taylor Forge's presence in the action coupled with its failure to avoid any potential prejudice to itself by attempting to file claims against Viacom under the court's supplemental jurisdiction. *Cf. id.* at 1124 (holding that dismissal under Rule 19(b) was improper where defendant could have avoided any threat of prejudice by joining the absent third party in its counterclaim against plaintiff) (citations omitted). We therefore hold that the district court's dismissal of this action under Rule 19 for failure to join Taylor Forge as an indispensable party constituted an abuse of discretion.

CONCLUSION

For the foregoing reasons, we vacate the district court's June 22, 1999 order granting defendant Kearney's motion to dismiss this action and remand for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed June 21, 1999]

98 Civ. 6226 (SAS)

VIACOM INTERNATIONAL, INC.,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	OPINION AND
	:	ORDER
MICHAEL W. KEARNEY,	:	
	:	
Defendant/	:	
Third-Party Plaintiff,	:	
	:	
-against-	:	
	:	
CAMP, DRESSER, AND MCKEE,	:	
	:	
Third Party Defendant,	:	
	:	
-and-	:	
	:	
CONOLOG CORPORATION,	:	
	:	
Third-Party Defendant/	:	

Fourth-Party Plaintiff, :
:
-against- :
:
TAYLOR FORGE STAINLESS, INC., :
:
:
Fourth-Party Defendant. :

SHIRA A. SCHEINDLIN, U.S.D.J.

Plaintiff, Viacom International, Inc. ("Viacom"), brought a breach of contract action against Michael W. Kearney ("Kearney") for indemnification and declaratory relief. Kearney counter-claimed against Viacom, and subsequently brought claims for monetary damages and injunctive relief against Conolog Corporation ("Conolog") and Camp, Dresser, and McKee ("CDM"). In response, Conolog has brought claims against Taylor Forge Stainless, Inc. ("Taylor Forge").

Kearney, claiming that Taylor Forge is an indispensable party to the action under Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 19, moves to dismiss the action for lack of subject matter jurisdiction because the joinder of Taylor Forge will destroy diversity of citizenship, the sole source of this Court's jurisdiction.

Conolog, joined by Viacom, moves for a severance and a stay of the claims pending against them until the Viacom-Kearney indemnification dispute is resolved.

I. Factual and Procedural Background

Gulf and Western Manufacturing ("Gulf and Western"), predecessor to Viacom, was the sole shareholder of Taylor Forge, a Delaware corporation engaged in the manufacture and sale of stainless steel, alloy fittings, and flanges. See Complaint ("Compl.") ¶8. Taylor Forge operates a manufacturing facility located in Somerville, New Jersey. On October 26, 1984, Kearney entered into a contract ("the Agreement") with Gulf and Western to purchase all existing shares in Taylor Forge. See id. ¶ 9. Viacom alleges that Kearney breached two provisions of the Agreement, and seeks both compensatory damages and a declaratory judgment concerning Kearney's future obligations.

Viacom's complaint against Kearney consists of three counts. In its first Count, Viacom alleges that the defendant has failed to honor section 7.7(iii) of the Agreement to indemnify Viacom for all costs and expenses in excess of $1.75 million paid to third parties to implement an environmental cleanup plan (the "Cleanup Plan") for Taylor Forge's New Jersey facility. Id. ¶15. The Cleanup Plan was required by an Administrative Consent Order issued by the New Jersey Department of Environmental Protection, and entered into by both Kearney and Gulf & Western in October 1984. Viacom alleges that it has thus far paid more than $3.8 million to third parties to implement the Cleanup Plan, and that Kearney has refused to pay any indemnification to Viacom. Id. ¶11. In its second Count, Viacom alleges that Kearney allowed Taylor Forge to worsen the environmental condition of the Taylor Forge facility in

violation of a provision of the Agreement, section 7.7(i), which prohibits him from doing so. Id. ¶19. In its final count, Viacom seeks declaratory relief ordering Kearney to indemnify Viacom for all existing and future costs stemming from the Cleanup Plan in excess of $1.75 million. Id. ¶23.

On November 30, 1998, Kearney brought twenty-two counterclaims against Viacom, alleging that Viacom committed fraud in negotiating the Agreement by misrepresenting the environmental situation of Taylor Forge, and failed to remediate its contamination of the site. See Answer, Separate Defenses, Counterclaim, Third Party Complaint and Jury Demand. Kearney also brought a third party complaint against Conolog, a Delaware corporation which operates a facility near the Taylor Forge site. Kearney alleges that the adjacent Conolog Facility contaminated and worsened the environmental condition of the Taylor Forge site. Id.

Viacom and Kearney have engaged in prior litigation concerning the Agreement and the Cleanup Plan. In August 1993, Kearney and Taylor Forge sued Gulf & Western's successor in the Superior Court of New Jersey (the "New Jersey action"). See Taylor Forge Stainless, Inc. v. Paramount Communication Realty Corp., No. SOM-L-1538-93. Kearney and Taylor Forge pled a number of legal theories but the thrust of their contentions were that (1) Gulf & Western misrepresented the extent of the environmental contamination and the projected cost and time needed to clean up the facility; (2) Gulf and Western and its successors failed to clean up the facility in a diligent, careful and timely manner; and

(3) the cost of implementing the Cleanup Plan refers to the actual physical remediation of the facility rather than tests, studies, evaluations, plans, and other similar expenses.

In May 1994, the parties consented to a dismissal of that action without prejudice so that they could work out a settlement. The court retained jurisdiction to enforce its order of dismissal, which provided that Taylor Forge and Kearney could reinstate the action if the parties did not reach a settlement. A full settlement between the parties was never reached, and Viacom filed this action in September 1998. The parallel state action in which all parties to this action are present, including Taylor Forge, is again active and currently pending in the Superior Court of New Jersey with a trial date set for June 1999.

On November 8, 1998, Kearney moved to dismiss or transfer this action. In February 1999, Kearney's motion was denied in an Opinion and Order holding that this Court had jurisdiction over the parties, venue was properly laid, and that transfer to the District of New Jersey was not warranted in light of the deference given to plaintiff's choice of forum. See Viacom International, Inc. v. Kearney, 98 Civ. 6226(SAS), 1999 WL 92601 (S.D.N.Y. Feb. 18, 1999). I also held that abstention in favor of the parallel state action was not warranted, noting that the federal courts are charged with a "virtually unflagging obligation ... to exercise the jurisdiction given them." Id. at *5 (quoting Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 817 (1976)). Given this obligation, abstention is only appropriate under "exceptional circumstances," which were not present at

that time. Id. at *6. That opinion tangentially discussed the importance of Taylor Forge as a party to the action. "[T]he pleadings in both actions suggest that the allocation of expenses for the cleanup is the central dispute between the parties; any dispute between Viacom and Taylor Forge appears secondary." Viacom, 1999 WL 92601 at *6. When that Order was issued (February 1999), the only parties to the suit were Viacom, Kearney, and Conolog.

However, that Order did not address the indispensability of Taylor Forge as a party to the action. First, the prior statement regarding Taylor Forge was made in the context of a request for federal abstention in favor of a parallel state action. Abstention is a disfavored doctrine which is valid "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." Colorado River Water Cons. Dist., 424 U.S. at 813. The Second Circuit has consistently found abstention to be "an 'extraordinary and narrow' exception to a federal court's duty to exercise its jurisdiction." FDIC v. Four Star Holding Co., 98 Civ. 6112, 1999 WL 325976 (2d Cir. May 21, 1999) (Colorado River, 424 U.S. at 813). The extremely stringent threshold set for a finding of abstention is far higher than that necessary for a Rule 19 finding of an indispensable party.

Second, the facts of the case have changed substantially. On March 12, 1999, Conolog served a fourth party complaint against Taylor Forge, alleging that Taylor Forge caused the environmental contamination of

Conolog's New Jersey facility. On March 19, 1999, Kearney asserted claims against CDM, a Massachusetts-based environmental consultant to Viacom. Kearney alleges that the mishandling and misfeasance of CDM exacerbated the site's environmental problems, and inhibited the normal business operations of Taylor Forge.

The addition of these parties changed the nature of this suit. As a result, it is no longer possible to view this case as merely a contract-based indemnification dispute independent of the environmental status of the Taylor Forge site, as it may have been in February.[1]

In April 1999, Kearney filed the instant motion to dismiss for lack of subject matter jurisdiction. Kearney claims that Taylor Forge is a necessary party to this action whose joinder is required by Fed. R. Civ. P. 19(a). Kearney further claims that Taylor Forge is an indispensable party according to Rule 19(b), requiring that this case be dismissed in favor of the New Jersey action where all parties, including Taylor Forge, can be present. The citizenship of all parties was diverse at the time this action was filed; however, the joinder of Taylor Forge, which like Viacom is a Delaware-chartered corporation, would deprive this Court of its jurisdiction.

---

[1] The difference in context between a request for abstention and a Rule 19 determination of indispensable party, and the addition of CDM and Taylor Forge as parties, distinguishes the analysis here from that of the prior Opinion. Thus, the prior Opinion which tangentially discussed the importance of Taylor Forge as a party is not binding.

Viacom opposes this motion and joins Conolog in a motion to sever and stay Kearney's claims against Conolog pending resolution of Viacom's contractual claims. Conolog argues that the principal dispute between Viacom and Kearney is a contractual matter to which it is not a party. Kearney responds that the major issue in this action is not merely contractual, but concerns the environmental status of the Taylor Forge site. As such, the claims between Kearney and Conolog are not independent of the Viacom-Kearney dispute.

II. Rule 19: Necessary and Indispensable Parties

Rule 19 sets forth a two-part test to determine whether or not an absent party is indispensable to the continuance of an action. First, Rule 19(a) ascertains whether the absent party is "necessary," and must be joined if such joinder is feasible. If the threshold standard of Rule 19(a) is met, but joinder of the absent party is not feasible, the court must continue with Rule 19(b) to "assess whether or not, in equity and good conscience the action should proceed in the necessary party's absence." Associated Dry Goods Corp. v. Towers Fin. Corp., 920 F.2d 1121, 1124 (2d Cir.1990).

Because Taylor Forge, like Viacom, is a corporation chartered in Delaware, its joinder is not feasible. Therefore, if Taylor Forge is a necessary and indispensable party, Kearney's motion for dismissal for lack of subject matter jurisdiction must be granted.

A. Rule 19(a)--Necessary Parties

There are two situations in which Rule 19(a) makes the joinder of a party necessary if feasible. Such joinder is necessary if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or
>
> (2)(A) the person claims an interest relating to the subject of the action and
>
> (B) is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19.

Viacom argues that this action primarily concerns a breach of contract - a contract to which Viacom and Kearney were the sole parties. Viacom insists that Taylor Forge, a non-party to the contract, is not a necessary party under Rule 19(a), citing Bayer Corp. v. SmithKline Beecham PLC, 95 Civ. 5582(SHS), 1996 WL 34164 (S.D.N.Y. Jan. 29, 1996). In Bayer, the court found that, "[a]bsent an identifiable harm, [the absent parties], as the subject of the contract and not parties to it, are not 'necessary' parties to the litigation." Id. at *6.

However, Bayer carefully distinguishes its ruling from situations in which "the subsidiary was an active participant in the underlying dispute." Id. at *6. In such situations, a third party may indeed be necessary to a contractual claim despite its non-signatory status. See Johnson & Johnson v. Coopervision, Inc., 720 F. Supp. 1116, 1119 (D. Del. 1989) ("While the only signatories to the Purchase Agreement are Johnson & Johnson and Cooper, another entity, Johnson's Iolab subsidiary is inextricably linked to the transaction. Iolab is a necessary party"). "Where the subsidiary is an active participant in the activity alleged as the basis for recovery, the subsidiary should be a party to the action." Gay v. AVCO Fin. Serv., Inc., 769 F. Supp. 51, 56 (D.P.R.1991) (citing Freeman v. Northwest Acceptance Corp., 754 F.2d 553 (5th Cir. 1985)). See also Dou Yee Enterprises (S) PTE. Ltd. v. Advantek, Inc., 149 F.R.D. 185, 188 (D. Minn. 1993) ("Applying Rule 19(a) the court determines that Advantek-Singapore is a party that should be joined in this action. Although the Agreement is only between Advantek-U.S. and Dou Yee, Advantek-Singapore ... was a primary participant in the alleged fraudulent acts underlying Dou Yee's claims.").

The relationship between Kearney and Taylor Forge is directly analogous to that between the parent and subsidiary corporations discussed in the aforementioned cases. The Agreement designated Kearney as the sole shareholder in Taylor Forge. While it is true that the only parties to the Agreement are Kearney and Viacom, Taylor Forge is directly implicated as an active, if not the primary, participant in the transaction. For example, Section 2.1 of the Agreement requires Taylor Forge, not

Kearney, to make all payments to Viacom for the purchase of the corporation. Section 7.7(iii) of the Agreement, in which the Buyer [Kearney] agrees not to allow Taylor Forge to worsen the environmental status of its facility, again directly implicates Taylor Forge as an active participant in the disputed conduct. Therefore, Taylor Forge's non-party status under the Agreement should not bar its joinder as a necessary party.

Viacom charges Kearney with permitting Taylor Forge to worsen the environmental condition of the New Jersey site. See Compl. ¶¶ 12-13. Taylor Forge has a substantial legal interest in the environmental management of its own facility and the disposition of the action in its absence may as a practical matter impair or impede its ability to protect that interest. See Fed. R. Civ. P. 19(a)(2)(i).

Kearney's counter-claims against Viacom and third-party plaintiff claims against both Conolog and CDM further implicate the necessary status of Taylor Forge in this dispute. Kearney seeks injunctive relief on multiple counts ordering Viacom to remediate the damage caused by its alleged mishandling of the Taylor Forge site cleanup project. Kearney also demands injunctive relief ordering CDM and Conolog to remediate any contamination of the Taylor Forge site caused by their mishandling of hazardous substances. Such valid claims for injunctive relief are troubling in the absence of Taylor Forge. In addition, Taylor Forge is seeking injunctive relief on nearly identical grounds from these same parties in the parallel state action, thus causing a substantial risk that

multiple parties may incur inconsistent obligations should this action continue. See Rule 19(a)(2)(ii).

Satisfying the requirements of Rule 19(a)(2)(i), and (a)(2)(ii), where meeting the criterion for either of these Rules would be sufficient, clearly qualifies Taylor Forge as a necessary party for joinder.

B. Rule 19(b) - Indispensable Parties

Once a party is found necessary for just adjudication under Rule 19(a), but joinder of that party is not feasible, the court must look to Rule 19(b) to determine whether or not the case may proceed in that party's absence. Rule 19(b) requires a pragmatic and fact-based analysis. The Rule lists four factors to guide the Court in assessing whether to proceed or dismiss. No one factor is determinative, nor should the Court necessarily place more emphasis on one factor over another. 4 James Wm. Moore, Moore's Federal Practice, §19.05[1][A] (Matthew Bender 3d ed.) at 19-80. These factors are:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

Rule 19(b) directs the court to weigh these factors in "equity and good conscience," thus leaving the district court with "substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward." Dou Yee Enterprises (S) PTE, Ltd., 149 F.R.D. at 187 (quoting 7 Charles A. Wright and Arthur R. Miller, Federal Practice & Procedure, §1604 at 45- 46 (West Group 2d ed.)). Applying these factors yields the conclusion that Taylor Forge is an indispensable party to this action.

Viacom has an entirely sufficient parallel forum in New Jersey to litigate all of its claims. Accordingly, there is no reason to believe that the plaintiff will not have the opportunity to achieve an adequate remedy if this suit is dismissed for nonjoinder. However, as the preceding analysis demonstrates, Taylor Forge has an undeniable legal interest in the resolution of this action and its absence is likely to prove prejudicial in protecting that interest. Given that the issues surrounding the parties in this case are inextricably intertwined, and the multiple demands for injunctive relief, it is doubtful that an adequate remedy can be fashioned which would lessen the prejudice faced by Taylor Forge as an absent party to this dispute.

Finally, an implicit interest indicated in the Rule 19(b) factors is, "the public interest in complete, consistent and efficient settlement of controversies." Envirotech Corp. v. Bethlehem Steel Corp., 729 F.2d 70,

73 (2d Cir.1984). Courts have interpreted the third factor of Rule 19(b), whether a judgment rendered in the person's absence will be adequate, to "refer to this public stake in settling disputes by wholes, whenever possible." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968). Kearney has demonstrated that because of the overlap that exists between the issues before this Court and those in the parallel state action, it would offend the notion of judicial economy to permit this action to continue in Taylor Forge's absence.

Taylor Forge is an indispensable party to this action and it must be joined. Because its joinder will destroy diversity of citizenship, this Court no longer has subject matter jurisdiction over the dispute. As a result, there is no need to consider Conolog's motion to sever and stay.

III. Conclusion

For the foregoing reasons, Kearney's motion to dismiss for lack of subject matter jurisdiction is granted. The Clerk is directed to close this case.

SO ORDERED:

/s/
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
June 21, 1999

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APPENDIX C

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

[Filed July 12, 2000]

Dkt. No. 99-7797

Viacom International, Inc.,	:
Plaintiff-Counter-Defendant-Appellant,	:
v.	:
Michael W. KEARNEY,	:
Defendant-Third-Party-Plaintiff-Counter- Claimant- Appellee,	:

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Michael W. Kearney.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing in DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requrested that a note be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/_____
Beth J. Meador,
Adminstrative Attorney

APPENDIX D

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

CHAPTER 85--DISTRICT COURTS; JURISDICTION

PART IV--JURISDICTION AND VENUE

Section 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be

deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

* * * * *

Section 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(2)

No. 00-528

Supreme Court, U.S.
FILED
NOV 6 2000
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TAYLOR FORGE STAINLESS, INC.
and MICHAEL W. KEARNEY,

Petitioners,

v.

VIACOM INTERNATIONAL INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petition correctly identifies the parties to the proceeding as Michael W. Kearney, Taylor Forge Stainless, Inc. and Viacom International Inc. Although third-party defendants Camp Dresser & McKee and Conolog Corporation did not submit briefs to either the District Court or the Second Circuit Court of Appeals, both have been served with this brief in opposition.

Viacom International Inc. is a wholly-owned subsidiary of Viacom Inc., a publicly held company.

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7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1917 (2d Ed. 1986 & 1999 Supp.) 9

Respondent Viacom International Inc. ("Viacom"), respectfully submits this brief in opposition to the Petition of Michael W. Kearney and Taylor Forge Stainless, Inc. (collectively, "Petitioners") for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioners Michael W. Kearney and Taylor Forge Stainless, Inc. challenge the Second Circuit's decision concluding that fourth-party defendant Taylor Forge was not an absent party and therefore could be considered neither a necessary, nor an indispensable party whose joinder was required. The Second Circuit held that the District Court could properly exercise jurisdiction over claims by Taylor Forge against non-diverse plaintiff Viacom under the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367, which grants a District Court supplemental jurisdiction over non-diverse claims asserted by any party other than plaintiff.

The Petition is devoid of any basis warranting a grant of certiorari. The Petition fails to satisfy any of the standards for granting a Writ of Certiorari under this Court's Rule 10. The Petition raises four questions, of which only question three was even arguably implicated below.[1] The Second Circuit's decision is not in conflict with any other circuit. Nor does the decision involve a state court's interpretation of federal law. Similarly, the ruling fails to raise a question which conflicts with any decision of this Court or which

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1. On its own initiative, the Second Circuit requested supplemental briefing on the issue implicated by petitioners' question 3 — whether the District Court could exercise supplemental jurisdiction over Taylor Forge's claims against Viacom without destroying diversity jurisdiction.

should be settled by this Court. The Second Circuit's ruling is a well-reasoned application of clear statutory text with no far-reaching implications. Accordingly, the Petition for Writ of Certiorari should be denied.

BACKGROUND

This dispute arises from a contract for the sale of Taylor Forge Stainless, Inc., a Delaware corporation ("Taylor Forge") engaged in the manufacture and sale of stainless steel, alloy fittings and flanges, and based in Somerville, New Jersey. In 1984, Viacom's predecessor, Gulf & Western Manufacturing ("Gulf & Western"), incorporated Taylor Forge.

On October 26, 1984, Gulf & Western entered into a contract with the manager of its Taylor Forge plant, petitioner Michael Kearney, to sell Taylor Forge to Kearney. To facilitate the sale, Viacom's predecessor and Kearney entered into a consent order with the New Jersey Department of Environmental Protection and undertook to implement a cleanup plan on the Taylor Forge premises.

In an indemnity provision of the parties' sale contract, Viacom's predecessor and Kearney agreed to split the future costs of implementing the cleanup plan. Viacom's predecessor agreed to pay the first $1.75 million in third party costs incurred in implementing a cleanup plan, and Kearney agreed to pay all such costs in excess of $1.75 million. Although Viacom (and its predecessors) has, over the past ten years, spent over $5 million in third party costs in implementing the cleanup plan, and is continuing to incur such costs, Kearney has yet to pay his indemnity to Viacom.

Anticipating litigation on his indemnity, Kearney fired the first shot. In August 1993, Kearney and Taylor Forge sued Gulf & Western's successor, Paramount Communication Realty Corporation ("Paramount"), in Superior Court of New Jersey (the "New Jersey Action"). The complaint sought declaratory and other relief, challenging the validity or coverage of Kearney's contractual indemnity. The complaint alleged that Gulf & Western procured the contractual indemnity by fraud or misrepresentation. In May 1994, the parties consented to a dismissal without prejudice of the New Jersey Action.

In September 1998, Viacom filed this breach of contract suit in federal court in the Southern District of New York to enforce Kearney's contractual indemnity. The Complaint asserts no claim against Taylor Forge — a non-party to the contract. Kearney responded to the complaint by moving to dismiss on various grounds including lack of personal jurisdiction, improper venue and abstention and, in the alternative, sought transfer to the District of New Jersey. All of those arguments were rejected by the District Court.[2] Kearney then proceeded to re-instate the complaint he and his company, Taylor Forge, had previously filed and dismissed against Viacom in New Jersey state court.

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2. Kearney eventually responded with an Answer, Separate Defenses, Counterclaim, Third Party Complaint, and Jury Demand, in which he asserted twenty-two counterclaims against Viacom. Kearney also interposed third party complaints against Conolog Corporation, a neighbor of the Taylor Forge premises whom Taylor Forge alleged contributed to the contamination, and Viacom's environmental consultant, Camp, Dresser & McKee. Conolog subsequently served a Fourth Party Complaint seeking contribution and indemnification against Taylor Forge.

After his initial attempts to dismiss the federal action were rejected, Kearney again moved to dismiss, this time arguing that Taylor Forge was an indispensable party whose presence would destroy the District Court's diversity jurisdiction. Before both the District Court and the Second Circuit, Viacom argued that Taylor Forge was not, in fact, an absent party because it had already been impleaded by third-party defendant Conolog.

While the District Court granted Kearney's motion to dismiss, the Second Circuit reversed that decision, concluding that, as Viacom had previously asserted, "Taylor Forge was already present in the litigation and could have joined with Kearney in asserting its 22 claims against Viacom without destroying the court's subject matter jurisdiction." *Viacom International Inc. v. Kearney*, 212 F.3d 721, 726 (2d Cir. 2000).

ARGUMENT

I.

THE PETITION FAILS TO MEET ANY CRITERIA FOR THE GRANTING OF A WRIT OF CERTIORARI

This Court's Rule 10 dictates that a "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Sup. Ct. Rule 10, 28 U.S.C.A. (West 1984 & Supp. 2000). It follows that "[a] petition for a writ of certiorari will be granted only for compelling reasons." *Id.* While Rule 10 is "neither controlling nor fully measuring [of] the Court's discretion," it provides three instances in which the Court may consider granting a writ of certiorari. *Id.* Only two of

those instances involve decisions by a federal court of appeals.[3] Neither of those circumstances is implicated here.

The Second Circuit's decision does not conflict with prior decisions of this Court, the Second Circuit or other courts of appeal. Petitioners' arguments to the contrary are based upon cases decided *before* the enactment of the Supplemental Jurisdiction Statute in 1990 (Petition at 6-7, citing *Strawbridge v. Curtiss*, 7 U.S. 267 (1806); *Shields v. Barrow*, 58 U.S. 130 (1854); *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941); and *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978)). None of these cases applies here.

The remaining cases cited by Petitioners indicate neither a split amongst authorities on "*the same important matter*" nor an "important question of federal law that has not been . . . settled by this Court." Rather, Petitioners cite to cases which either fail to address § 1367, or concern the minimum $75,000 amount in controversy requirement of 28 U.S.C. § 1332, which is neither implicated nor disputed here.[4] (Petition at 6-7, citing *E.R. Squibb & Sons v. Accident & Cas. Ins. Co.*, 160 F.3d 925 (2d Cir. 1998); *Lewis v. Odell*, 503 F.2d 445, 447 (2d Cir. 1974); *Maryland Cas. Co. v. W.R. Grace & Co.*, 23 F.3d 617, 621 (2d Cir.), *cert. denied*, 513 U.S. 1052, 115 S. Ct. 655 (1994); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996); *Shanaghan v. Cahill*, 58 F.3d 106 (4th Cir. 1995); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998);

3. The other circumstance involves a decision by a state court on a matter of federal law.

4. Petitioners acknowledge that Viacom is seeking costs in excess of $4 million. (Petition at 2).

Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999); *In re: Abbott Laboratories, Inc.*, 51 F.3d 524 (5th Cir. 1995)).

The Petition is a meritless attack upon a decision which Petitioners deem "incorrect." (Petition at 16). "A petition for writ of certiorari is *rarely* granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. Rule 10 (emphasis added). Even where a conflict exists amongst circuits, a petition for writ of certiorari is to be denied if such conflict is "tolerable" or "narrow." *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (J. White, dissenting). *See also D.L. Thomas v. American Home Products, Inc.*, 519 U.S. 913, 917 (1996) (J. Rehnquist, dissenting) (petitions for writ of certiorari should be granted in "exceptional" circumstances). The Petition fails to identify *any* conflict between the Second Circuit's decision and prior decisions of this Court or of other circuits. To the contrary, the decision represents a routine application of the supplemental jurisdiction statute and lacks any "exceptional" circumstances warranting this Court's review.

II.

THE SECOND CIRCUIT'S DECISION WAS REQUIRED UNDER 28 U.S.C. § 1367

Section 1367(a) provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. . . ." 28 U.S.C. § 1367(a). The statute expressly

provides that this broad grant of jurisdiction includes "claims involving the joinder or intervention of additional parties." *Id.*

Because the District Court had diversity jurisdiction over this action between the original parties, Viacom (a Delaware corporation) and Kearney (a Florida resident), § 1367(a) provides the court supplemental jurisdiction over "all other claims" that form part of the same case.[5] Here, "the substance of Taylor Forge's claims are identical to Kearney's 22 compulsory counterclaims. . . . [and] are, by definition, 'part of the same case or controversy.' " *Viacom International Inc. v. Kearney*, 212 F.3d. 721, 727-28 (2d Cir. 2000) (citation omitted).

The Petition asserts that this exercise of supplemental jurisdiction by the District Court would eviscerate the complete diversity requirements of 28 U.S.C. § 1332. (Petition at 12). Not so. The very purpose of § 1367 was to "allow[] federal courts to entertain claims over which they have no independent basis of subject matter jurisdiction." 16 James Wm. Moore et al., *Moore's Federal Practice*

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5. Petitioners now argue that this Court's decision in *Chicago v. Int'l Col. of Surgeons*, 522 U.S. 156 (1997) making "clear that 'original' jurisdiction is still a condition precedent to the exercise of supplemental jurisdiction" is somehow in conflict with the Second Circuit's decision in this case. (Petition at 11). Such is not the case. It is clear that the District Court had jurisdiction over the original parties to the case, Viacom and Michael Kearney. *Viacom International v. Kearney*, 212 F.3d. 721, 726 (2d Cir. 2000) (citing *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 388 (1998)). *Chicago* did not equate "original jurisdiction" with supplemental jurisdiction exercised after additional parties had been impleaded.

§ 106.02 (3d ed. 1997). The Supplemental Jurisdiction Statute does not affect § 1332's requirement of complete diversity between plaintiff and defendant. Section 1367 merely grants supplemental jurisdiction, where such diversity exists as between the original parties, over additional parties and claims joined to the litigation. *Id.* The Second Circuit recognized that § 1367(b) provides an explicit exception to the complete diversity requirements in instances where a *defendant*, such as Kearney, impleads a party who chooses to assert claims against a non-diverse plaintiff, as Taylor Forge has done in this case.

The Petition's reliance on § 1367(b) to suggest that the District Court lacked supplemental jurisdiction over Taylor Forge's claims is equally misplaced. (Petition at 6-15). "By no means does [§ 1367(b)] exclude [supplemental jurisdiction] from diversity cases." *See* David D. Siegel, *Practice Commentary, The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction, printed in* 28 U.S.C.A. § 1367 at 832 (West 1993). Subsection (b) does not apply to claims by Taylor Forge nor, for that matter, to claims by anyone other than plaintiff Viacom:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by *plaintiffs* against persons made parties under Rule 14, 19, 20 or 24 of the Federal Rules of Civil Procedure. 28 U.S.C. § 1367(b) (emphasis added).

Section 1367(b) was designed to prevent *plaintiffs* from smuggling in claims against non-diverse parties. *See* David

D. Siegel, *Practice Commentary, The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction, printed in* 28 U.S.C.A. § 1367 (West 1993) ("Subdivision (b) of § 1367 is concerned only with efforts of a *plaintiff* to smuggle in claims that the *plaintiff* would not otherwise be able to interpose. . . . The repetition of the word '*plaintiffs*' at several rule-citing junctures in subdivision (b) makes this clear.") (emphasis added). *See also Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 161 (3d Cir. 1995) ("[Subdivision (b) of § 1367] does not deprive the district court of supplemental jurisdiction over a counterclaim or cross-claim raised by an intervening defendant, even where the intervenor shares citizenship with an original party."); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 412 n.15 (3d Cir. 1993) (noting that plaintiff was precluded from amending its complaint to include non-diverse party as defendant under § 1367(b)).[6]

The Second Circuit recognized that "§ 1367(b) reflects Congress' intent to prevent original plaintiffs — but not defendants or third parties — from circumventing the

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6. *See also* 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1917 (2d Ed. 1986 & 1999 Supp.) ("[Section 1367(b)] specifically prohibits the exercise of . . . [supplemental] jurisdiction in diversity cases for persons seeking to intervene as *plaintiffs* . . ."); 4 James Wm. Moore et al., *Moore's Federal Practice* § 19.04[1][b] (3d ed. 1999) ("[Section 1367(b)] precludes supplemental jurisdiction over claims (1) by *plaintiffs* joined under Rule 19 (necessary parties); (2) by absentees seeking to intervene as *plaintiffs* under Rule 24 (intervention); and (3) by *plaintiffs* against parties joined under Rule 14 (third-party practice or impleader), Rule 19 (necessary parties), Rule 20 (proper parties), or Rule 24 (intervention).") (emphasis added). Petitioners' argument that Taylor Forge should be aligned as a defendant (Petition at 18) renders § 1367(b) inapplicable as a bar to its claims against Viacom.

requirements of diversity." *Viacom International Inc. v. Kearney*, 212 F.3d. 721, 726-27 (2d Cir. 2000) (citing H.R. Rep. No. 101-734, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875). There is *no* conflict among the circuits about this point.

Nothing in § 1367(b) restricts the District Court's ability to exercise supplemental jurisdiction over claims by anyone other than plaintiff Viacom. Viacom has no claim against Taylor Forge and has asserted none in either this federal action or the parallel state court action. Accordingly, as the Second Circuit concluded, the District Court can properly exercise jurisdiction over Taylor Forge's claims against Viacom without destroying diversity jurisdiction.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition in its entirety.

Respectfully submitted,

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No. 00-528

IN THE

Supreme Court of the United States

TAYLOR FORGE STAINLESS, INC.
and MICHAEL W. KEARNEY,

Petitioners,

v.

VIACOM INTERNATIONAL INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
PETITIONERS' REPLY BRIEF

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PARTIES TO THE PROCEEDING

The parties to the proceeding and corporate disclosure statement remain the same as set forth in the Petition for a Writ of Certiorari.

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Viacom's Answer, Counterclaims and Crossclaims dated September 14, 1999 in the New Jersey state action SL-51

Petitioners, Taylor Forge Stainless, Inc. ("Taylor Forge") and Michael Kearney ("Kearney") respectfully submit this brief in reply to Respondent's, Viacom International Inc. ("Viacom"), opposition to the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Viacom's opposition brief illuminates precisely why this Court needs to address the application of the Supplemental Jurisdiction Statute ("SJ Statute") in diversity jurisdiction situations. On page 5 of Respondent's brief, Viacom presupposes (without citing any precedent) that the SJ Statute overrules the complete diversity requirements of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), the joinder/indispensable party requirements of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941) and Shields v. Barrow, 58 U.S. (17 How.) 130 (1854) and this Court's rejection, in Owen Equip. & Erection Co. v. Kroger, 437 U.S. 635 (1978), of manipulation of diversity jurisdiction. Viacom's sole basis for making this supposition is that the Supreme Court cases cited above pre-dated the enactment of the SJ Statute.

Based on this incredible conclusion, which, contrary to Viacom's statement does have "far-reaching implications", Viacom fails to address any of the following issues raised and supported by legal precedent in Petitioners' moving brief:

First, that before the SJ Statute can provide supplemental jurisdiction, a federal court must first have legitimate original diversity jurisdiction (meaning, among

other things, that all indispensable parties have been joined in the original pleading);[1]

Second, that original diversity jurisdiction cannot exist in the event that plaintiff (in this case, Respondent, Viacom) has failed to join an indispensable party as a defendant whose presence would destroy diversity jurisdiction and which had an interest in the outcome of the dispute from its inception. (In addition to cases cited above and in Petitioners' moving brief, see Freeport-McMoran Inc. v. K N Energy, Inc., 498 U.S. 426, 111 S.Ct. 858 (1991) confirming that while the general rule is that diversity is considered at the time an action is initially filed, an exception exists in the event an indispensable party plaintiff or defendant, such as Taylor Forge, is omitted from the original pleading);

Third, that parties are not free to align parties as they desire or as fortuitously occurs because of third or fourth party actions. Parties to an action must be aligned or realigned to correspond to their actual conflicting interests in the case;

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[1] Viacom implies that Petitioners waited too long to bring the motion to dismiss on subject matter jurisdictional grounds. Aside from the fact that subject matter jurisdictional defects are never waived, Viacom's implication is inaccurate. Petitioner, Kearney, did raise the subject matter jurisdictional defect in his **first** dismissal motion, **before** third-party defendant, Conolog, had impleaded Taylor Forge on contribution grounds. However, since Respondent, Viacom, was not given an opportunity to reply to the legal argument, the district court judge ordered a round of full briefing prior to deciding the issue. After that full round of briefing she dismissed the federal action in the opinion which is the subject of this Petition.

Fourth, that the legislative purpose of subsection (b) of the SJ Statute was to prevent, not encourage, the misuse or manipulation of diversity jurisdiction and was never intended to benefit plaintiffs (such as Respondent, Viacom) in obtaining or retaining improper diversity jurisdiction by the expedient of naming only the diverse obligees/obligors to a contract or dispute and waiting for other parties to implead the non-diverse obligees/obligors;[2]

Aside from completely avoiding a discussion of any of these critical legal issues, Respondent, Viacom makes sweeping and unsupported assertions regarding (a) the clarity of the SJ Statute and (b) the nature of the conflict between Viacom and Taylor Forge.

Not only does Viacom groundlessly ignore all diversity jurisdiction related Supreme Court precedent predating the enactment of the SJ Statute, Viacom also disregards Supreme Court precedent post-dating the enactment of the SJ Statute. That precedent, Chicago Int'l Col. of Surgeons, 522 U.S. 156 (1997) and Wisconsin Dept. of Corrections v. Schact, 524 U.S. 381 (1998), makes it quite clear that the SJ Statute did not operate to overrule existing Supreme Court precedent concerning original jurisdictional requirements, nor operate to eviscerate the discretion, inherent in the district courts, to choose to abstain from exercising supplemental

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[2] Although Viacom avers that this matter should be tried in federal district court, Viacom has brought a declaratory judgment action in New Jersey state court seeking to obtain the very same monies from its insurers that it here seeks to obtain from Petitioner, Kearney.

jurisdiction for reasons other than those set forth in the SJ Statute.

Contrary to Viacom's contentions, the application of the SJ Statute is neither straightforward, nor uncomplicated. Were it so, the various Circuit courts would not be interpreting and applying it in such conflicting manners (as discussed in Petitioners' Moving Brief). Moreover, there would not be almost four hundred law review and periodical articles concerning this subject matter, many of which describe the SJ Statute as problematic and confusing, and some of which categorize it as a disaster. As discussed in Petitioners' Moving Brief, the American Law Institute has proposed sweeping changes, and the various authors of the SJ Statute have been and continue to be in a heated, bitter dispute among themselves as to how to interpret and apply the SJ Statute.

Viacom is not asking this Court to endorse a "tolerable" or "narrow" conflict. There is nothing narrow about a conflict which has different Circuits (based on the same statutory language, legislative history and case law) reaching very different conclusions regarding the existence of federal jurisdiction.

Contrary to In re: Abbott Laboratories, Inc., 529 U.S. ____, (2000), which dealt exclusively with jurisdictional amounts in controversy, the within matter squarely presents several vital issues (diversity, joinder, and realignment) which this Court needs to decide in connection with the SJ Statute and diversity jurisdiction.

Also important to this Court's consideration are (a) Viacom's mischaracterization and belittling of the nature

of the dispute among these three parties (Taylor Forge/Kearney/Viacom), and (b) Viacom's evasion of Petitioners' argument that even under the Second Circuit analysis, supplemental jurisdiction should not be exercised because Viacom has asserted direct claims against third-party defendant, Conolog Corporation, which is, itself, a Delaware corporation.

Respondent, Viacom, implies that immediately upon signing the contract in 1984 with Petitioner, Kearney, it began to "implement a cleanup plan on the Taylor Forge premises." Not only is this statement inaccurate (since no cleanup plan, even a conditional one, even existed until 1989), but it downplays the central issue among these three parties. That issue is as follows: Of the 5 million dollars allegedly expended by Viacom at the site over the past 16 years, how much of that (a) was legitimately expended on cleanup implementation work (a concept derived from the New Jersey Environmental Cleanup Responsibility Act) as opposed to sampling and monitoring work, (b) was negligently expended by the first consultants which were replaced after more than 3 million dollars and fourteen years of work and expenditures, and (c) was related to soil, rather than groundwater issues (the latter of which were addressed exclusively in Section 7.7 (ii) of the contract, and for which **Petitioner, Taylor Forge, not Petitioner, Kearney,** has expended hundreds of thousands of dollars for which it is entitled to reimbursement from Viacom).

Viacom cannot seek an interpretation and application of Section 7.7(iii) of the contract, without simultaneously seeking an interpretation and application of Sections 7.7(i) and 7.7(ii). These three sections, when read together, make it clear that Kearney, Taylor Forge

and Viacom are all necessary and indispensable parties to any dispute concerning apportionment of monies spent on environmental work at Taylor Forge's New Jersey property. Indeed, the documents contained in the Joint Appendix filed with the Second Circuit make it clear that during the entire period between 1984 and today (with the sole exception of Viacom's complaint in this federal action) both Kearney and Taylor Forge were parties to all contractually related disputes, agreements, and negotiated resolutions. It is Taylor Forge which owns the contaminated property, pays for groundwater related costs pursuant to Section 7.7(ii) of the contract, and is obligated on the promissory note to Viacom. Petitioner, Kearney, bought Taylor Forge for one dollar.

In a recent stay/abstention hearing, which has yet to be decided, the federal district court judge confirmed that she remained convinced that her dismissal on subject matter jurisdictional grounds was "right and the [Second] Circuit was wrong." Her basis for saying this was that it was all form over substance as to whether Taylor Forge or Viacom asserts the claim against the other. (Stay/Abstention Motion Transcript, Supplemental Lodging Appendix, "Supp. App.", at SL-1, pg. 43, line 25-pg. 44, lines 1-14).[3]

In order to avoid asserting direct claims against Taylor Forge (and thereby automatically destroying jurisdiction) Viacom has taken the approach of forcing Taylor Forge to make the claims and respond by asserting affirmative defenses. However, the claims exist and must

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[3] In other words, Viacom is, in fact, attempting to improperly "'smuggl[e] in claims against non-diverse parties.'" (Respondent's Brief at 8).

be tried, whether asserted by or merely defended by Viacom. See, for example, Case Management Order Number 4 from the parallel New Jersey action, Supp. App. at SL-48. The Order provides that Taylor Forge will refrain from filing an Order to Show Cause forcing Viacom to obtain a permit required for effectuating the cleanup of the Taylor Forge Site due to Viacom's eleventh hour agreement to obtain the permit. That concession by Viacom came after Viacom repeatedly refused to obtain the necessary permit and begrudgingly was made in order to attempt to preserve Viacom's deficient jurisdiction in federal court.

Finally, Viacom's continued attempts to prosecute this federal action amounts to bad faith even in accordance with the ruling of the Second Circuit.

Footnote four of the Second Circuit's opinion makes it clear that Viacom cannot assert what the Second Circuit referred to as "upsloping" claims against Conolog any more than it can assert those claims against Taylor Forge. Although Viacom has not yet responded to Conolog's federal court pleading, it has responded to Conolog's pleading in the parallel reinstated New Jersey Action. As shown by that pleading, a copy of which is included in the Supplemental Lodging Appendix at SL-51, Viacom has asserted numerous upsloping claims against Conolog. These claims, when asserted in federal court, will destroy diversity jurisdiction, even under the Second Circuit's analysis.

If Viacom chooses not to assert these claims in the within federal action (to attempt to circumvent the Second Circuit's decision) then Viacom will have assured piecemeal litigation. This is a result the legislature never

contemplated when enacting the SJ Statute, which was intended to assist in avoiding piecemeal litigation, where appropriate.

Boiled down to its essentials, it becomes apparent that Viacom has been engaged in nothing more than a manipulation of diversity jurisdiction requirements. Neither the legislature, nor this Court has ever countenanced such manipulation and should not do so now.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in the moving brief, Petitioners respectfully request that this Honorable Court grant the Petition in its entirety.

Respectfully submitted,

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